

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**CARNIVAL CARTING, INC. and
ROMAR SANITATION, INC.**

AND

**CASE NOS. 29-CA-20586
29-CA-22552**

**LOCAL 813, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

***Kathy Drew King, Esq.*, for the General Counsel
Emanuel F. Saris, Esq., of Hyde Park, New York,
for the Respondent**

SUPPLEMENTAL DECISION

ELEANOR MACDONALD, Administrative Law Judge: On April 5, 2006 the National Labor Relations Board issued its Corrected Supplemental Order in the above-captioned case directing Respondent Carnival Carting, Inc. to reinstate and make whole its employee Frank Mendez for any loss of earnings and other benefits suffered as a result of his discharge in violation of the National Labor Relations Act. On August 7, 2006 the United States Court of Appeals for the Second Circuit issued its Judgment enforcing the Board's Order and ordering Respondent to pay Frank Mendez the amount of \$105,569.98, plus interest, and to pay the Union the sums of \$15,795 and \$6,480, plus interest, to reimburse its Pension Fund and Severance Plan.

Procedural History

On May 21, 2008 the Regional Director for Region 29 issued a Notice of Hearing in the above-captioned case alleging that Respondent Carnival Caring, Inc., and Romar Sanitation, Inc., constitute a single-integrated business enterprise and a single employer within the meaning of the Act, and asserting that Romar Sanitation is jointly and severally liable with Respondent Carnival Carting to comply with the Board's Corrected Supplemental Order and the Supplemental Judgment.

The hearing was scheduled to open on September 16, 2008.¹

On August 16, 2008 the General Counsel issued separate subpoenas *duces tecum* to Carnival Carting, Inc. and to Romar Sanitation, Inc., and a subpoena *ad testificandum* to Roger Carnivale, the president of Carnival Carting, Inc. and the president of Romar Sanitation, Inc. By Order of September 8, 2008 Respondent's request to revoke the subpoenas was denied

¹ After issuance of the Notice of Hearing the Regional Director granted Respondent's request for a postponement of the hearing due to the illness of Roger Carnivale, the principal of both Carnival Carting and Romar Sanitation.

because the request was untimely under the Board's Rules and because no valid basis for revocation was stated in the request. On September 11, 2008 Respondent provided a letter from Bonnie Kiner-Strachan, M.D., Roger Carnivale's treating physician, stating the he would be immunocompromised for more than a year and recommending that he not appear in court for that period of time.

The hearing opened on September 16, 2008. Respondent was represented by Counsel. Respondent did not provide the subpoenaed documents. The hearing was postponed until November 17, 2008 and Counsel were directed to seek guidance from Roger Carnivale's doctor as to whether he would be able to testify on that date. At the hearing, Counsel for Respondent declined to make any arrangements to produce the subpoenaed documents stating that he did not know whether he would have access to them while Roger Carnivale was ill.

By Order of November 12, 2008 the hearing was postponed to May 18, 2009 due to the continuing illness of Roger Carnivale.

Prior to the scheduled hearing date of May 18, 2009, Counsel for the General Counsel requested that Respondent advise her whether Roger Carnivale would indeed be able to testify on May 18. On May 14, I received a letter postmarked May 12 from Dr. Kiner-Strachan stating that Roger Carnivale would be immunocompromised for six months to a year and recommending that he not appear in court for that period of time. In a conference call with Dr. Kiner-Strachan she informed me that Roger Carnivale was fatigued and might only appear in public wearing a mask.² She stated that he might be able to answer questions from one-half hour to one hour depending on his condition on a particular day. The possibility of taking Roger Carnivale's testimony by a method other than his appearance in court was raised in an e mail addressed to all Counsel. The parties were advised on May 15 that the hearing would go forward on May 18 and that the parties should be prepared to discuss a procedure to obtain testimony from Roger Carnivale.

At the hearing on May 18, 2009 the parties discussed Counsel for the General Counsel's suggestion to arrange for Roger Carnivale's testimony by videoconferencing from a location close to his residence or for him to testify via SKYPE or by telephone. Counsel for the General Counsel estimated the length of the required testimony as no more than an hour. Counsel for the General Counsel also asked that the subpoenaed documents be produced in advance of this testimony. Counsel for the General Counsel stated that the Region had restrained about \$193,000 in assets of a Romar Sanitation corporate bank account through a pre-judgment writ of garnishment. Counsel for the General Counsel established on the record her need for the subpoenaed documents going back to the time of the unfair labor practice in 1996.³ Counsel for the General Counsel stated her belief that the records were in Roger Carnivale's sister's home. Counsel for Respondent was directed to produce the subpoenaed documents. Counsel for Respondent agreed to make an effort to locate and produce the subpoenaed documents. The discussion centered on the fact that one benefit of obtaining the subpoenaed documents was to limit the testimony that might be required of Roger Carnivale and, possibly, to obviate the need for any such testimony.

Counsel for Respondent stated that he would write to Roger Carnivale and communicate

² Despite multiple efforts to reach Counsel for Respondent he was apparently not available to participate in this conference call.

³ The records sought by General Counsel related to the ownership, management and operations of Carnival Carting and Romar Sanitation.

with Counsel for the General Counsel concerning the subpoenaed documents. Counsel for Respondent stated that he did speak to his client on the telephone. The hearing was adjourned without date.

5 In August 2009, Counsel for Respondent and Counsel for the General Counsel met with a Settlement Judge in an attempt to settle the case, but no settlement ensued.

10 On August 17, 2009 Counsel for the General Counsel requested that the case be scheduled for hearing after October 15, 2009. Counsel for the General Counsel stated that Counsel for Respondent had not responded to repeated efforts to obtain information about the subpoenaed documents. Counsel for Respondent did not respond to the August 17 letter.

15 By Order of September 10, 2009, the hearing was scheduled to resume on October 16, 2009.

20 By letter of September 21, 2009 Counsel for the General Counsel asked Counsel for Respondent to inform her whether Roger Carnivale would testify at the October 16 hearing in person or through videoconferencing or some other method. The letter also asked for production of the subpoenaed documents and gave notice that if the documents were not produced Counsel for the General Counsel would make a limiting motion precluding Respondent from introducing evidence concerning the subjects covered by the subpoenaed documents. Respondent did not produce the documents in response to Counsel for the General Counsel's request. Respondent's request for postponement of the October 16 hearing was denied.

25 At the hearing on October 16, 2009 Counsel for Respondent stated, "[A]s of yesterday it is my understanding that I have been cleared to actually be able to contact [Roger Carnivale]." Counsel for Respondent stated that Roger Carnivale was now able to provide testimony. It was thought that this testimony might be taken in a location close to Roger Carnivale's residence. Counsel for Respondent stated that he would meet with Counsel for the General Counsel on 30 October 21 to "go over any outstanding documentation that's been requested by General Counsel." Counsel for Respondent undertook to provide the subpoenaed documents after the meeting of October 21. In return, Counsel for the General Counsel agreed to provide Counsel for Respondent with a copy of a deposition transcript of Roger Carnivale's testimony given on April 2, 2008 in a U.S. District Court proceeding.

35 Counsel for Respondent agreed that Roger Carnivale would appear to testify, stating, "It is my preference that he appears live." The parties agreed to reconvene the hearing on November 12, 2009, thereby giving Counsel for Respondent adequate time to obtain the subpoenaed documents and turn them over before the hearing date.

40 After October 16, 2009 Counsel for the General Counsel attempted to find a location close to Roger Carnivale's home from which he could testify.

45 Beginning on November 2, 2009 both the ALJ and Counsel for the General Counsel made numerous written efforts to ascertain whether Roger Carnivale would indeed provide testimony on November 12. It had become apparent that in order to permit him to testify close to home a significant expenditure of government funds would be required. Counsel for the Respondent did not reply to written requests from the ALJ. Further, Counsel for the Respondent had not communicated with or turned over the subpoenaed documents to Counsel 50 for the General Counsel since meeting in her office on October 21 and receiving a copy of Roger Carnivale's deposition.

An Order of November 4, 2009 set the hearing location for the agreed-upon date of November 12 at the Division of Judges in New York City.

I note that Counsel for the Respondent did not communicate with the ALJ or with Counsel for the General Counsel from October 21 through November 10. In summary, the subpoenaed documents were not produced and no information concerning Roger Carnivale's availability or non-availability to testify was provided despite repeated requests for such information.

On November 10, 2009 Counsel for the Respondent sent a letter stating, "Late yesterday afternoon I was advised that my wife must undergo a biopsy ... [November 12]." The letter continued, "In addition I have been advised that Mr. Carnivale's medical condition may not be as positive as first thought but will not be able to explore those facts until after my wife's procedure." Counsel for Respondent stated that he would not be able to appear in court on November 12. I note that Counsel's letter did not refer to or explain his failure to produce the subpoenaed documents as promised; three weeks had gone by since his meeting to discuss the documents with Counsel for the General Counsel. Further, Counsel's letter did not provide any specific information about Roger Carnivale's ability to testify nor did it state why doubts were being raised at the last minute about his availability on November 12.

The hearing took place on November 12 as scheduled. No one appeared on behalf of Respondent.

No further evidence has been proffered concerning Respondent's failure to produce the subpoenaed documents and no further evidence has been proffered concerning Roger Carnivale's failure to appear to testify on November 12, 2009.

The Evidence

At the hearing Counsel for the General Counsel requested that pursuant to the Board's decision in *Bannon Mills*, 146 NLRB 611, (1964), certain sanctions should be imposed on Respondent. This request was granted; as a result the General Counsel was permitted to prove the case through the use of secondary evidence and I shall draw an adverse inference due to Respondent's failure to produce the subpoenaed documents.

Counsel for the General Counsel requested a finding pursuant to Federal Rule of Evidence 804 (a) (4) that Roger Carnivale is "unable to be present or to testify at the hearing because of ... then existing physical ... illness." This request was granted based on statements from his doctor about his treatment and immunocompromised state and based on the most recent statement from Respondent's Counsel that Roger Carnivale's health was not as positive as was thought when arrangements were being made to take his testimony. Under Rule 804 (b) (1) a deposition given by Roger Carnivale would not be excluded as hearsay. Counsel for the General Counsel also cited Federal Rule of Civil Procedure 32 (3) and (4) (C). Roger Carnivale's deposition taken on April 2, 2008 in the presence of Respondent's Counsel was thereupon received into evidence.

The General Counsel contends that Carnivale Carting, Inc, and Romar Sanitation, Inc. constituted a single employer and/or a single integrated enterprise at the time the unfair labor practices were committed. The underlying Decision in this case, JD(NY)-62-00, adopted by the Board in an unpublished Order in the absence of exceptions, found that Carnival Carting, Inc., provides removal of refuse for business firms and that Roger Carnivale is the president. The Decision found that Frank Mendez was employed as a helper by Carnival Carting from 1984 to

1996.⁴ Mendez' boss was Roger Carnivale. Every week Mendez received a check made out to "Cash" signed by Roger Carnivale and drawn on the account of Romar Sanitation, Inc. On December 15, 1996 Roger Carnivale told Mendez that he was discharged. The Decision found that Carnivale Carting, Inc., discharged Mendez in violation of Section 8(a)1(and (3) of the Act.

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Roger Carnivale's deposition establishes the following facts:

Roger Carnivale was employed by Carnival Carting, Inc.⁵ He was the president and chief executive and he owned stock in the company. Roger Carnivale could not recall when he became president of Carnival Carting; he was still the president in 2007. In 1996 and 1997 Roger Carnivale was an officer of Carnival Carting and he did the hiring and firing at Carnival Carting. The office and place of business of Carnival Carting was at 51-29 64th Street, Woodside, NY. The property is now owned by Lorraine Cassletto, sister of Roger Carnivale; previously it had been owned by his mother, Mary Carnivale. Carnival Carting had no lease at 51-29 64th Street and did not pay rent for the use of the property. Carnival Carting owned two garbage trucks in 1996 and two garbage trucks in 2007.

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Carnival Carting housed its two garbage trucks at 58-70 56th Street, Woodside, NY.⁶ This location was owned by Romar Sanitation, Inc. Carnival Carting did not have a lease for the 56th Street location; however, Carnival Carting was supposed to pay rent to Romar Sanitation in the amount of \$2000 per month. Carnival Carting did not pay rent to Romar Sanitation every month; it paid the rent only sporadically. Roger Carnivale could not recall whether Carnival Carting had last paid rent to Romar Sanitation in 2005 or 2006 or 2007.⁷ Romar Sanitation's only revenue was rent paid by Carnival Carting. Romar Sanitation never sued Carnival Carting for non-payment of rent.

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Until at least 2007 Carnival Carting had two credit cards. Roger Carnivale paid the bills for Carnival Carting. Roger Carnivale submitted bills to customers of Carnival carting. He handled the banking and he wrote the checks for Carnival Carting.

Carnival Carting did not own any cars used for business from 1996 to 2007.

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At the time of the deposition in April 2008, Carnival Carting had no corporate bank account. Carnival Carting is out of business and is unable to pay the judgment outstanding against it.

Roger Carnivale was the president and a shareholder of Romar Sanitation.⁸ Romar Sanitation's office and place of business is at 51-29 64th Street, Woodside, NY. Romar does not

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⁴ Mendez helped to pick up garbage from restaurants and bars in Manhattan. There were at least two truck drivers employed by Carnival Carting.

⁵ At the time of the deposition in 2008 Roger Carnivale was retired.

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⁶ The documents recording the mortgage and transfer pertaining to this location place the property in Woodside, NY, although Roger Carnivale apparently believed that the property was in Maspeth, NY.

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⁷ During the investigation of the instant case, Roger Carnivale had provided records to Counsel for the General Counsel showing that in 2003 Carnival Carting was five years in arrears on rent payments to Romar Sanitation. In June, July and August 2005, the last year for which records were made available, Carnival Carting paid Romar Sanitation a total of \$2000 for the rent due in July 2000.

⁸ He did not recall if he was the president and CEO in 1996.

pay rent to Lorraine Cassletto for use of the premises. Romar Sanitation does not provide trash removal services. According to Roger Carnivale, the only business engaged in by Romar Sanitation was owning the building at 58-70 56th Street, Woodside, NY, where Carnival Carting kept its garbage trucks. Romar Sanitation paid the utility charges for the building using proceeds of the rent paid by Carnival Carting. The only telephone at the building was in the name of Carnival Carting; Carnival Carting paid the bills for this telephone. The checks made out to Frank Mendez by Romar Sanitation were funded by rent paid to Romar by Carnival Carting. Romar issued Frank Mendez a 1099 tax form showing that "Romar Sanitation Inc d/b/a Carnival Carting Inc" had paid him \$15,600 in the year 1996. Roger Carnivale's deposition states that Frank Mendez was employed by Romar Sanitation as a janitor.

Romar Sanitation owned a Jeep Cherokee between 1996 and 2007. Roger Carnivale used the vehicle for personal and business transportation.

Romar Sanitation and Carnival Carting had no written agreements concerning the sharing of employees or income, or the rental of the premises at 58-70 56th Street where the Carnival Carting trucks were kept. The two companies probably used the same accountant. Romar Sanitation had bank accounts but Roger Carnivale could not recall if these were in the same bank used by Carnival Carting.

Various documents in the record show the history of the building at 58-70 56th Street, Woodside, NY. On December 17, 1976 Carnival Carting purchased the building for \$75,000 pursuant to a ten year purchase money mortgage signed by Roger Carnivale as vice president of Carnival Carting. On the same day, Carnival Carting transferred the building to Roger Carnivale and Richard Carnivale, d/b/a R/R Associates for "no consideration" except the amount of \$10.00. On December 28, 1984, R/R Associates transferred the building to Romar Sanitation for \$10.00 and subject to the assumption of the unpaid principal on the existing mortgage in the amount of \$25,769.64. The Indenture shows that "Richard Carnivale a partner of R/R Associates" assigned the property to "Romar Sanitation, Roger Carnivale, President."

The mortgage on the building at 58-70 56th Street, Woodside, NY, was satisfied on September 9, 1987. On August 24, 2007, Romar Sanitation sold the building to ANF Realty LLC for \$730,000; the assessed value of the building at that time was \$189,000. The Indenture states that "Roger Carnivale is conveying all his right title and interest in the property individually and as President of Romar Sanitation Inc." Romar Sanitation was dissolved on October 1, 2008.

Frank Mendez testified in the instant hearing that Roger Carnivale hired him and gave him his work assignments. He identified the 1099 tax form he received for the year 1996 from "Carnival Carting Inc d/b/a Romar Sanitation Inc" in evidence. Part of the form is typewritten and part of it is handwritten; Mendez stated that is how the tax form appeared when he received it. I credit Mendez' testimony.

Discussion and Conclusions⁹

The General Counsel asserts that Carnival Carting and Romar Sanitation constitute a single employer.

⁹ Counsel for the General Counsel filed a brief on November 24, 2009. Counsel for Respondent filed a brief on December 18, 2009.

The Board has held that, "The hallmark of a single employer is the absence of an arm's-length relationship among seemingly independent companies. The Board looks at four factors in making a finding on this issue: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. While the Board considers common control of labor relations a significant indication of single-employer status, no single aspect is controlling, and all four factors need not be present to find single-employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case." (Footnotes and quotation marks omitted.) *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007), enf'd. 551 F.3d 722 (8th Cir. 2008).

There is ample evidence of the interrelation of operations between Carnival Carting and Romar Sanitation. Both companies operated out of the same office at 51-29 64th Street, Woodside, NY. Carnival Carting garaged its garbage trucks at 58-70 56th Street, Woodside, NY, a location owned by Romar Sanitation. Romar Sanitation engaged in no business operations aside from serving as the owner of the building where Carnival Carting kept its trucks. Carnival Carting was the only source of income for Romar Sanitation. The rent paid by Carnival Carting was used by Romar Sanitation to pay for the utilities in the building and to pay wages to Frank Mendez. Romar Sanitation owned a Jeep Cherokee vehicle which was used to provide business and personal transportation to Roger Carnivale. Carnival Carting did not own any vehicle aside from the garbage trucks and there is no evidence that Carnival Carting or Roger Carnivale paid Romar Sanitation for the use of the Jeep Cherokee. The free use of Romar Sanitation's Jeep Cherokee is an indicium of the lack of an arm's-length relationship between the two companies.

The record of the real estate transactions for the building at 58-70 56th Street supports a finding of lack of arms-length transactions between Carnival Carting and Romar Sanitation. Carnival Carting bought the 56th Street building on December 17, 1976 for \$75,000, and on the same day transferred it to Roger Carnivale and Richard Carnivale d/b/a R/R Associates for no consideration except \$10.00. In 1984 R/R Associates and Richard Carnivale transferred the building to Romar Sanitation subject to the assumption of the mortgage amount of \$25,769. Romar Sanitation sold the building in 2007 for \$730,000. Thus, Carnival Carting transferred a building worth \$75,000 to Roger and Richard Carnivale for \$10.00. Richard Carnivale gave up his interest in the building to Romar Sanitation in return for the assumption of the mortgage of 1/3 the original purchase price less than 10 years later. In 2007 the building was worth \$730,000. By any measure, Romar Sanitation received a bargain price when it was took title to the building. Further, there was no lease or other writing to compel the payment of rent by Carnival Carting to Romar Sanitation. Indeed, Carnival Carting paid rent to Romar Sanitation sporadically, running as much as five years in arrears on the rent payments, but Romar Sanitation never took any legal action to compel the payment of the amounts due. The absence of any effort by Romar Sanitation to compel the payment of rent by Carnival Carting is evidence of the lack of an arm's-length relationship between the two entities.

The fact that Romar Sanitation was not actively engaged in refuse removal and that its business was to serve as owner of the garage for Carnival Carting's trucks does not negate a finding of single employer status. The Board has held that, "Notwithstanding the different business purposes between real estate companies and other types of businesses, a single employer relationship can be found particularly where there is evidence of a lack of an arm's-length relationship between the entities." *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993), enf'd 55 F.3d 684 (D.C.Cir. 1995);

The record shows that the criteria of common management and of common ownership or financial control have been met in the instant case. At the time of the unfair labor practice in

December 1996 Roger Carnivale was an officer, an owner and the CEO of Carnival Carting. Roger Carnivale billed customers for garbage removal, he wrote the checks to pay bills on behalf of Carnival Carting and he handled the banking and real estate transactions. Similarly, Roger Carnivale was the president of Romar Sanitation, he was an owner of the company and he wrote checks on behalf of Romar Sanitation. He paid the bills for Romar Sanitation and entered into real estate transactions on behalf of Romar. There is no evidence that any other individual directed the affairs of Romar Sanitation.

Finally, I find that the criterion of centralized control of labor relations has been satisfied.

The Board has determined that Roger Carnivale was Frank Mendez' boss when he was employed by Carnival Carting from 1984 to 1996. Roger Carnivale asserted that he did the hiring and firing at Carnival Carting and the Board found that Carnival Carting discharged Mendez. Roger Carnivale's deposition states that Mendez was employed by Romar Sanitation as a janitor. The evidence shows that Roger Carnivale was the only boss at Romar Sanitation. Roger Carnivale signed checks drawn on Romar Sanitation's account to pay Mendez' wages. Romar Sanitation issued a 1099 tax form to Mendez showing that he had been paid wages in 1996 by "Romar Sanitation Inc d/b/a Carnival Carting Inc." Clearly, Roger Carnivale controlled the labor relations at both entities. Even though Frank Mendez' purported employment by Romar may have been a fiction engaged in by Roger Carnivale, that alone would not change the single employer conclusion. The finding of single employer status is not undercut by the lack of specific evidence indicating centralized control of labor relations where one of the entities had no employees or no employees other than the owner of the company. *Three Sisters Sportswear Co.*, 312 NLRB at 863; *Bolivar-Tees, Inc.*, 349 NLRB at 722.

Because I have found Carnival Carting and Romar Sanitation to be a single employer, both of these entities are jointly and severally liable for remedying the violations found by the Board. "[W]hen an order is issued against an insolvent employer, derivative liability may be imposed on a nominally separate business entity which is nonetheless shown to be so closely related to the guilty employer that a single-employer relationship can be established...." *Emsing's Supermarket*, 282 NLRB 302 (1987), *enfd.* 872 F.2d 1279 (7th Cir. 1989).

Conclusions of Law

Carnival Carting, Inc., and Romar Sanitation, Inc., constitute a single employer within the meaning of section 2(6) and (7) of the Act, and they are jointly and severally liable to remedy the unfair labor practices found by the Board.

On these conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Carnival Carting, Inc., and Romar Sanitation, Inc., Woodside, New York, a Single
Employer, its officers, agents, successors, and assigns, shall pay Frank Mendez the amount of
\$105,569.98, plus interest, and shall pay to the Union the sums of \$15,795 and \$6,480, plus
interest, to reimburse its Pension Fund and Severance Plan.

Dated, Washington, D.C., February 9, 2010.

Eleanor MacDonald
Administrative Law Judge